81-2186

No.

Office - Supreme Court, U.S.
FILED
JUN 28 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

M. R. YUDOFSKY & ASSOCIATES, a Kentucky Partnership, and
MORRIS R. YUDOFSKY & ASSOCIATES, another Kentucky Partnership - - Petitioners

versus

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF FINANCE - - Respondent

On Petition for a Writ of Certiorari
To the Court of Appeals of Kentucky

BRIEF FOR RESPONDENT IN OPPOSITION

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June 21, 1982

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COMMONWEALTH OF KENTUCKY DEPARTMENT OF FINANCE - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

As set out in Petitioners' Appendix, pages 23-51.

JURISDICTION

Petitioners assert jurisdiction pursuant to 28 USC 1257. Respondent denies that jurisdiction is properly laid in this Court and denies that a substantial federal or constitutional issue is involved.

CONSTITUTIONAL PROVISIONS ASSERTED

Petitioners assert the application of the Fifth Amendment and the Fourteenth Amendment. Respondent denies their applicability.

STATEMENT OF THE CASE AND FACTS

The Petitioners in their Statement of the Case have injected as much argument as a recitation of the salient facts of this case such as to render it unacceptable as an accurate reflection of the chronological history of this dispute. However, the trial court in its Findings of Fact and Conclusions of Law has detailed a concise, unbiased account of the pertinent facts of this case and the Respondent directs the Court to Petitioners' Appendix, pages 32-37 for review of the trial court's account. The only other facts that should be added to the trial court's account is that the Kentucky Court of Appeals affirmed the trial court on or about September 4, 1981 and that the Kentucky Supreme Court found no merit in the Petitioners' Motion for Discretionary Review, said Order denying discretionary review entered on March 2, 1982.

REASONS FOR DENYING THE WRIT

The thrust of the Petitioners' argument and their claim of federal jurisdiction lies in their unfounded belief that they have been denied "due process of law" as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. De-

spite the Petitioners' laudible attempts at federal jurisdiction on the above basis, even the most cursory of glances at the record in this case completely disputes their contentions.

In simplest terms this action is a routine state condemnation case filed by the Respondent against the Petitioners in state court pursuant to the statutory authority of Kentucky Revised Statutes 416.570 to 416.660 wherein the Petitioners' land was needed as part of public improvement in Louisville, Jefferson County, Kentucky. The Petitioners, as is their right under these statutes (KRS 416.600), filed an Answer to the condemnation petition contesting the Respondent's right to take their property. Upon consideration of the Petitioners' Answer the trial court set the matter for trial on the sole question of the Respondent's right to take the Petitioners' property. The trial on this one question involved three days of testimony and the receipt of over forty exhibits by the Court. The trial court then deliberated and subsequently handed down an eleven page Findings of Fact and Conclusions of Law painstakingly detailing the issues and arguments of the parties and ruling that the project in question was for a public purpose and that the Respondent had the right to condemn.

The Petitioners then availed themselves of their constitutional right to appeal this decision to the Kentucky Court of Appeals. They presented their arguments both orally and by brief to that Court. After a review of the record and upon hearing arguments of counsel the Court of Appeals rejected the Peti-

tioners' contentions stating that the law of Kentucky is that an appellate court is bound by the findings of the lower court unless the lower court's findings are "clearly erroneous." (Kentucky Civil Rule of Procedure 52.01). See also *Allen* v. *Arnett,* Ky., 525 S. W. 2d 748 (1975). However, the Court of Appeals did not stop with that basic statement. It went further and reaffirmed the trial court's decision when it stated in its opinion:

> It seems obvious that a parking garage to serve state-owned facilities as well as the general public is, indeed a public use. *Miller* v. *City of Georgetown,* Ky., 191 S. W. 2d 403 (1945). Nor is it fatal that some property will benefit more than others. *Sturgill* v. *Commonwealth, Department of Highways,* Ky., 384 S. W. 2d 89 (1964). See Petitioners' Appendix, page 28.

Not satisfied with these affirmations of the Respondent's right to condemn the Petitioners sought review by the Supreme Court of Kentucky. Their Motion for Discretionary Review by the Supreme Court of Kentucky was denied by that Court without comment indicating to the Respondent that the Kentucky Supreme Court found no merit in the Petitioners' claims nor found the Kentucky law so onerous that it needed review and alteration.

Where in the record is there the denial of due process which the Petitioners claim is an affront to the United States Constitution? The Petitioners received an exhaustive three day trial on the singular

question of the Respondent's right to condemn their property. They were allowed to call any and all witnesses they desired and introduce whatever proof they deemed necessary to support their position. They submitted briefs and made their arguments to the trial court and the Kentucky appellate court without success. It is obvious to the Respondent that from copies of the trial court's Opinion and of the Kentucky Court of Appeals' affirmation of that Opinion that the Kentucky courts gave the Petitioners their "day in court." The Petitioners' real complaint is not with the manner or form of their treatment in the Kentucky courts, not a question of a denial of due process at all, but rather the same sad litany of most losers in the adversary system — a cry of foul because the final decision goes against them.

Although the Respondent believes the record on its face completely negates the Petitioners' claim of a denial of due process, the Respondent feels it appropriate to comment briefly on the Petitioners' various arguments for review of this case. Petitioners claim the trial court erred when it "thought that KRS 247.140(2), *Functions of Fair Board,* created a presumption in favor of the condemnor's decision:" (See Petitioners' Brief, page 17). Contrary to Petitioners' assertions this Respondent does not read in the trial court's findings any such presumptions. What this Respondent sees in the trial court's findings is that after three days of trial the trial court *found,* not presumed, that the project in question was for a public purpose. If the trial court cited highway condemna-

tion decisions as supportive of its findings this Court should not find that unusual as highway cases make up the bulk of eminent domain decisions in the Commonwealth of Kentucky.

The Petitioners second argument is that somehow the Respondent delegated its sovereign powers to a private individual and that this delegation constitutes a denial of due process to them. The trial court upon hearing all of the evidence and viewing the witnesses found no merit in this argument. (See trial court's Conclusions of Law, Petitioners' Appendix, pages 38 and 39). The trial judge, as the trier of fact, upon weighing the proof before him exercised that cherished descretion of a trier of fact, whether judge or jury, and found against the Petitioners' arguments. Is this Court or any appellate court ready to substitute its judgment for that of the trier of fact absent fraud or gross abuse of discretion? The Respondent thinks not!

Petitioners' third argument is that the Kentucky courts failed to follow an Illinois state court decision in deciding this Kentucky case. The Petitioners claim that the case of *Reel* v. *City of Freeport,* Ill., 209 N. E. 2d 675 (1965) is "on all fours" with the case at bar. However, the truth is that the *Reel* case has absolutely no logical relationship to this case. First, an Illinois authority has no bearing on a Kentucky condemnation case. Nevertheless, the case is easily distinguished from this one because the parking garage that was to be built in the Illinois case was for

the sole benefit of a department store. The sole beneficiaries of the parking garage in this action will be the Commonwealth Convention Center and the new State Office Building. In the Illinois case, the City of Freeport was by contract to sell their existing parking garage to Montgomery Ward and to condemn for a new city parking garage. Herein, no such arrangements are contemplated nor is any private individual being facilitated. Any parallels that could possibly be drawn between these two cases are necessarily strained.

In the *Reel* case, the complaint is that Reel did not get his day in court because the Circuit Court dismissed his claim. Herein, the Petitioners did have their day in court, therefore the case is wholly inapplicable to the case at bar. Why the final outcome of the *Reel* case is not given by the Petitioners is that the issue at bar was not before that Court.

The Petitioners last three arguments are really repetitions of their earlier argument concerning the public use or character of the project in question. It is the Respondent's belief that the trier of fact is in the best position to view the evidence and apply the appropriate law. In Kentucky, pursuant to statute, the trial court is given the authority to determine the legitimacy of a condemnor's right to condemn private property. (KRS 416.610). The Petitioners were given every opportunity to contest the nature and motive of the purported public project, but failed to present significant proof to convince the courts of their position. There has been no denial of due process here,

but only the continued and unmerited assaults of a defeated adversary. The Respondent believes this dispute was best described by the trial court in the last paragraph of his Conclusions of Law when he stated:

> While the defendant, faced with the loss of its land, understandably looks for and sees through its eyes a surreptitious deal, this court, sees only the exercise of good business judgment. In any event, the proposed parking garage is a legitimate governmental purpose, is to be operated and maintained by the Commonwealth for the use of the general public, and hence the Commonwealth has by virtue of eminent domain the right to acquire the subject property, and the Commonwealth is entitled to immediate possession. (See Petitioners' Appendix, page 42).

CONCLUSION

The Respondent submits that the record herein cleary reflects no denial of due process and, thus no constitutional issue is presented. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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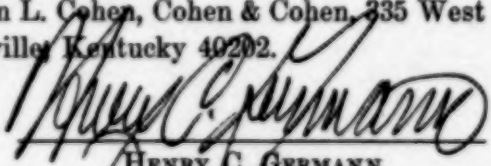
CERTIFICATE OF SERVICE

I, Henry C. Germann, counsel for Respondent, hereby certify that the attached Respondent's Brief in Opposition was served on Petitioners by depositing copies of the aforementioned document in the United States mail, first-class postage prepaid, on June 21, 1982, addressed to Petitioners' counsel, Edwin L. Cohen, Cohen & Cohen, 335 West Market Street, Louisville, Kentucky 40202.



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